IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1870

WHIRLPOOL CORPORATION, PETITIONER

vs.

RAY MARSHALL, SECRETARY OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Whirlpool Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW.

The opinion of the court of appeals (App. A, *infra*, pp. A1-A39) is reported at 593 F. 2d 715. The opinion of the district court (App. C, *infra*, pp. A43-A49) is reported at 416 F. Supp. 30.

JURISDICTION.

Timely petitions for rehearing and rehearing *en banc* were denied by the court of appeals on April 4, 1979 (App. B, *infra*, pp. A40-A42). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED.

Whether the Secretary of Labor exceeded his authority in promulgating a regulation pursuant to the provisions of the Occupational Safety and Health Act of 1970, which grants to employees a new right to refuse to perform assigned tasks, without resort to the expressly established statutory procedure, based on an employee's own subjective determination that he or she would be exposed to a dangerous condition.

STATUTE INVOLVED.

The relevant provision of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U. S. C. 651 *et seq.*) provides, in pertinent part (29 U. S. C. 660(c)(1)):

> "(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act."

STATEMENT.

This action was instituted by the Secretary of Labor under Section 11(c)(1) of the Occupational Safety and Health Act of 1970 (29 U. S. C. 660(c)(1); hereinafter "the Act"), and regulations promulgated thereunder. Section 11(c)(1) prohibits

an employer from discharging or in any manner discriminating against any employee "because of the exercise by such employee . . . of any right afforded by this Act."[1] The Secretary alleged that Petitioner unlawfully disciplined two of its employees for refusing to perform a particular assignment believed by the employees to present a dangerous situation, and that said discipline was in retaliation for the exercise by the employees of a right "afforded by this Act."

In support of his allegation, the Secretary relied on regulations which he has promulgated interpreting Section 11(c)(1) of the Act. In pertinent part the regulation, published at 29 C. F. R. 1977.12 (App. D, *infra*, pp. A50-A57), provides:

> "(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance

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1. Section 11(c)(2) of the Act, 29 U. S. C. 660(c)(2), in pertinent part, provides that:

> [a]ny employee who believes he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. * * * The Secretary shall cause such investigation as he deems appropriate. If * * * the Secretary determines that * * * this subsection ha[s] been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the * * * courts shall have jurisdiction * * * to restrain violations of [11(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

Section 11(c)(3), 29 U. S. C. 660(c)(3) directs the Secretary to notify the complainant of his determination under Section 11(c)(2) within 90 days of the complaint's receipt.

of other public agencies which have responsibility in the field of safety and health . . .

"(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The conditions causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury, and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain a correction of the dangerous condition."

Following a full trial, the district court entered judgment for Petitioner, reaching the conclusion "that the regulation in question is clearly inconsistent with the statute and therefore invalid" (App. C, *infra*, p. A47). The court explained that "[t]he reason for this holding is that the Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not." (*Id.*).[2]

On appeal by the Secretary,[3] the court of appeals observed that "[t]wo district courts below ruled that this regulation is

2. The court further held that, had the Secretary's regulation been valid, the employees would have been justified under the facts of the case in refusing to perform the particular work assignment. This finding was the subject of a cross-appeal by Petitioner.

3. The instant action was part of a consolidated appeal by the Secretary. In the companion case the Secretary appealed a decision of the United States District Court for the Southern District of Ohio granting Empire-Detroit Steel Division, Detroit Steel Corporation's motion to dismiss the Secretary's complaints for failure to state a claim upon which relief could be granted.

invalid because it has no statutory support and because OSHA's legislative history reveals Congressional intent at odds with the regulation" (App. A, *infra*, p. A2). The appellate court, however, was unpersuaded by the district court decisions and reversed those judgments based upon the twofold finding "that the Secretary's regulation is consistent with the stated purposes of the Act and its legislative history, and that it represents an appropriate employment of the regulatory power conferred upon the Secretary by the statute . . ." (App. A, *infra*, p. A2).

REASONS FOR GRANTING THE PETITION.

1. The decision of the court of appeals that the regulation in question is consistent with the statute, and with Congressional intent as manifested in the legislative history, is clearly erroneous and warrants review. In so holding, the court has disregarded the established principle that where an inconsistency between a regulation and a statute is so patent, a court has no alternative but to hold that the administrator has exceeded his authority and employed means not appropriate to the end elucidated in the Act. *See, e.g., Gardner* v. *United States*, 239 F. 2d 234 (5th Cir. 1956); *see also Commissioner of Internal Revenue* v. *South Texas Lumber Company*, 333 U. S. 496 (1941).

The existence of such an inconsistency in the case at bar is readily apparent. The Secretary's own interpretation of the protection afforded by Section 11(c)(1) begins with the revealing admission that "[r]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace." 29 C. F. R. 1977.12(b)(1).

The court of appeals, however, has ignored the Secretary's own interpretation of the Act and its legislative history, and has permitted the Secretary to accomplish administratively what Congress expressly denied him legislatively. The court's holding

is premised in large part upon the emotional, and unfounded, opinion that "29 U. S. C. § 660(c)(1)'s requirement that employers not retaliate against complaining employees should be read broadly, otherwise the Act would be gutted by employer intimidation" (App. A, *infra*, p. A12). Based upon this faulty presumption, the court held that "this regulation must be upheld in light of the deference given administrative interpretation of statutes, the broad reading traditionally given remedial statutes and the broad policy factors which underlie the regulation" (App. A, *infra*, p. A19).

The Secretary's regulation clearly provides the basis for potential abuse or, at best, is grounds for endless litigation. It permits an employee to subjectively determine that a dangerous condition exists, and to walk off the job until the employee determines that the hazard has been abated, without even requiring the employee to first resort to available statutory procedures. An employer is thus faced with making the determination of whether the employee's refusal is in "good faith," whether his fears are "reasonable" and ultimately must either allow his operation to be suspended or face litigation. Surely, after examining the situation and determining that the employee's fears are groundless, an employer's decision to continue the work must be accorded "good faith." To hold otherwise would give credence to the suggestion that most employers operate in callous disregard for the health and safety of their employees. Congress itself refused to make this assumption, noting that if employees informed their employers of an apparent hazardous condition then "99 times out of 100" the employer would correct it.[4] Where a "good faith" disagreement exists, employees may resort to the express statutory provisions. However, where Congress has given employers the benefit of the doubt, the courts must be required to do likewise.

2. There is likewise no merit to the court's conclusion that the right granted in the regulation may be implied from the

4. *See* 116 Cong. Rec. 38, 367-386; 116 Cong. Rec. 37, 327-346 (1970).

Act's overall remedial purpose. (*Id.*). In fact, Congress' failure to include such a right in the Act assumes even greater significance when contrasted with the express provisions for other varied and numerous employee rights. These rights include, *inter alia*, the right to challenge in the court of appeals the validity of a standard issued by the Secretary (29 U. S. C. 655(f)); the right to accompany inspectors during inspection (29 U. S. C. 657(e)); the right to file complaints or notify the Secretary of an alleged violation (29 U. S. C. 657(f)(1)(2)); the right to participate as a party at hearings and to contest the reasonableness of abatement periods (29 U. S. C. 659(c)); and the right to petition the court of appeals to review final orders of the Occupational Safety and Health Review Commission in cases involving their employer (29 U. S. C. 660(a)).

The familar rule of statutory construction—"expressio unius est exclusio alterius"—compels the conclusion that employees do not enjoy a protected right under the Act to walk off the job. Congress fully considered employee rights when it drafted the Act and elected not to provide the right contained in the Secretary's regulation. In similar statutes where Congress has elected to provide such rights, it has expressly done so.

For example, Section 502 of the Labor Management Relations Act, 29 U. S. C. 143, provides that "the quitting of labor by an employee . . . in good faith because of abnormally dangerous conditions for work at the place of employment . . . [shall not] be deemed a strike under this chapter." Clearly, Congress could have employed similar language to make the discharge of an employee a discriminatory act.

Similarly, in the recently enacted Federal Mine Safety and Health Act of 1977, 30 U. S. C. 801 *et seq.*, Congress expressly granted to the Secretary the right to order a shut down of a mine administratively, and to order the withdrawal of employees from the mine with pay, a right expressly denied under the Act. The power to order such withdrawal with pay is not limited to imminently dangerous situations, but includes nonabatement of

hazardous conditions, "unwarrantable failures" to comply with standards, and even violation of a miner's training requirements. 30 U. S. C. 814(b)-(h), 817. The amount of pay a miner is to receive when a withdrawal order is issued is also specified. 30 U. S. C. 814(g)(2), 821.

It is, therefore, readily apparent that the court of appeals erred in concluding that the right contained in the Secretary's regulation may be implied from the Act's overall remedial purpose. Quite the contrary, the absence of any expressed protection such as that contained in the Secretary's regulation reflects a Congressional intent not to extend such a "right" to employees.

3. Nor is there any merit to the court's attempt to distinguish the Secretary's regulation from the "strike with pay" provision which was rejected by Congress (App. A, *infra*, pp. A26-A29, A35). Indeed, the court's conclusion that an employee must be prepared to forego pay if necessary to escape the hazard is completely contradictory to the interpretation of Section 11(c)(1). Clearly, if the employee has a "right" to refuse to work in the presence of a hazardous condition, then the denial of pay to an employee who exercises that right would certainly be considered to have a "chilling effect" on that right, and be considered discriminatory "in any manner" under Section 11(c)(1).

In support of the above, it must be noted that the Secretary has issued an interpretive rule amending a regulation which states that any failure by employers to pay employees for time spent accompanying an OSHA inspector during an inspection would be discriminatory under Section 11(c) of the Act. (42 Fed. Reg. 47344, amending 29 C. F. R. 1977.21.) This revised interpretation is a complete reversal of the position previously taken by the Secretary, which held such time not to be compensable because the activity was not normal work activity. (*See* 38 Fed. Reg. 2681, Jan. 29, 1973.)

If the Secretary now feels that the denial of pay to employees who exercise their "walkaround" right is discriminatory, then

he cannot seriously assert that there is a distinction between that right and the right to refuse to work under conditions established by the regulation. Thus, the Secretary does, indeed, create the potential for a "strike with pay" which Congress rejected.

4. The court of appeals acknowledges that there is no express provision in the Act conferring jurisdiction upon federal district courts to decide the right of an employer to discipline an employee who refuses to work based upon the employee's claim that an assigned job would subject him to danger (App. A, *infra*, pp. A1-A2). The only grant of such jurisdiction is pursuant to a regulation which the court of appeals has upheld because it is "in no way inconsistent with the Act's purposes" (App. A, *infra*, p. A19).

The court's decision creates a likelihood of substantial future litigation before the district courts on labor relations matters such as strikes and employee discipline heretofore repeatedly held to be within the exclusive province of the National Labor Relations Board. In this respect, it should be noted (1) that the court's decision apparently vests the Secretary with the power to invoke or withhold district court jurisdiction as a purely discretionary matter and (2) that the court's decision apparently confers upon employees a new right to strike or otherwise refuse to perform work without loss of pay, a right which plainly has not been conveyed by Congress.

5. The court's decision squarely conflicts with that of the Fifth Circuit Court of Appeals in *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, ... U. S. ....., 99 S. Ct. 216 (October 2, 1978). The decision also conflicts with the decision of the Tenth Circuit Court of Appeals in *Marshall* v. *Certified Welding Corporation, et al.*, ... F. 2d ....., 7 OSHC 1069 (BNA, 10th Cir., December 28, 1978),

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Nos. 76-2143 and 2144
No. 76-2261

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

RAY MARSHALL, SECRETARY OF LABOR,
Appellant,

vs.

WHIRLPOOL CORPORATION

and

EMPIRE-DETROIT STEEL DIVISION, DETROIT STEEL CORPORATION,
Appellees.

WHIRLPOOL CORPORATION,
Cross-Appellant,

vs.

RAY MARSHALL, SECRETARY OF LABOR,
Cross-Appellee.

Consolidated Appeals from the United States District Courts for the Northern and Southern Districts of Ohio.

Decided and Filed February 22, 1979.

Before: EDWARDS, *Chief Judge;* KEITH and MERRITT, *Circuit Judges.*

KEITH, *Circuit Judge.* This case presents a legal question of great significance to American workers and their employers:

Whether under the Occupational Safety & Health Act of 1970, 29 U. S. C. §§ 651 *et seq.*, the Secretary of Labor may limit the right of an employer to discipline or discharge an employee who refuses to work in the good faith belief that to do so would subject him to danger.

In a carefully circumscribed regulation,[1] the Secretary of Labor (Secretary) has interpreted the Occupational Safety and Health Act's retaliatory discharge provision[2] as protecting an employee who withdraws from danger on the job under certain conditions: The employee's fear must be objectively reasonable, the employee must have sought correction of the dangerous condition and resort to normal OSHA enforcement procedures must be inadequate. Two district courts below ruled that this regulation is invalid because it has no statutory support and because OSHA's legislative history reveals Congressional intent at odds with the regulation. The district courts have sanctioned an employer's right to make workers choose between their jobs and their lives.

We cannot agree that the statute was ever intended to require placing an employee in such an untenable position. Since we find that the Secretary's regulation is consistent with the stated purposes of the Act and its legislative history, and that it represents an appropriate employment of the regulatory power conferred upon the Secretary by the statute, we reverse a ruling to the contrary entered without trial by one District Judge, and remand for further proceedings. As to the other appeal, where the District Judge, after evidentiary hearing, found violation of the regulation but denied relief because of his belief that the

1. 29 C. F. R. § 1977.12, *reprinted in* text, *infra*.

2. 29 U. S. C. § 660(c)(1) provides:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [OSHA] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA].

regulation was invalid, we also reverse and remand for appropriate remedy.

FACTS

The regulation in question here provides:

> **§ 1977.12 Exercise of any right afforded by the Act.**
>
> (a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.
>
> (b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing as-

signed tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Pursuant to 29 U. S. C. § 660(c)(2)[3] the Secretary, on behalf of three workers, separately sued defendants Detroit Steel Corporation and Whirlpool Corporation in federal district court for wrongfully retaliating against the workers' exercise of "[a] right afforded by the Act," 29 U. S. C. § 660(c)(1) namely, the right conferred by the regulation, *supra* to withdraw from the risk of serious danger on the job.

In No. 76-2262, *Marshall* v. *Detroit Steel Corp.*, the district court dismissed the Secretary's complaint, ruling that it failed to state a claim upon which relief could be granted. For purposes

3. 29 U. S. C. § 660(c)(2) provides:

Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of [29 U. S. C. § 660(c)(1)] may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of [29 U. S. C. § 660(c)(1)] have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of [29 U. S. C. § 660(c)(1)] and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

of this appeal, we must assume that the allegations in the complaint are true and that Detroit Steel violated the regulation. *Conley* v. *Gibson*, 335 U. S. 41, 45-46 (1957). Thus, we are directly faced with the pure issue of whether the Secretary's regulation is valid. In No. 76-2143, *Marshall* v. *Whirlpool Corp.*,[4] the district court also found the regulation to be invalid but only after conducting an evidentiary hearing and concluding that the Secretary's complaint was factually correct: the regulation had been violated. An examination of the facts in that case[5] illustrates that this issue is no mere academic exercise, but literally one of life and death.

The Whirlpool Corporation maintains a manufacturing plant at Marion, Ohio where it produces household appliances. The Marion plant has 13 miles of overhead conveyors which transport appliance components throughout the plant. In order to prevent injury should an appliance component fall from one of the overhead conveyors, the Company installed a huge guard screen approximately 20 feet above the plant floor. The guard screen is suspended over one-third of the total plant floor area. As part of their regular duties, maintenance employees must remove fallen parts from the screen and replace paper spread on the screen to catch grease drippings. In addition the overhead conveyors occasionally need maintenance. In order to perform their duties, maintenance workers must step onto the steel mesh screen itself.

The original steel mesh user 16-gauge panels although starting in 1973 the company began to replace these panels with heavier mesh which could better withstand the stresses imposed

4. Reported as *Usery* v. *Whirlpool Corp.*, 416 F. Supp. 30 (N. D. Ohio 1976).

5. The District Judge's fact finding appears at 416 F. Supp. 30, 32 (N. D. Ohio 1976). In No. 76-2144, the Whirlpool Corporation cross-appeals, claiming that the District Judge's findings of fact were clearly erroneous regardless whether the regulation was valid. Our examination of the record, however, reveals ample support for his conclusion that the employees declined to do their work because they reasonably feared for their lives.

upon it. The questionable safety of the 16-gauge screens is demonstrated by several incidents where workers fell partly through them and at least one incident where a worker fell to the plant floor below but survived. A number of maintenance employees reacted to these "near-misses" by frequently bringing the unsafe screen conditions to the attention of their foremen. Their complaints were to no avail, and on June 28, 1974, a maintenance employee fell to his death through the guard screen in a section where stronger wire mesh had not yet been installed.[6] Although Whirlpool did respond to the fatality by issuing a general order directing maintenance employees to clean guard screens without walking on them and to effectuate some repairs where the screens were weak, two employees who regularly worked on the screens pointed out that many hazardous areas remained. When the company did not respond to their fears regarding these areas, the two employees asked the company safety director to provide them with the local OSHA area office's phone number. The "safety director" gave them the number but made veiled threats that the men should watch what they were doing and took their names and clock numbers.

The night following this incident the two men punched in on their shift and awaited their assignments. They were ordered onto the screens to do their maintenance work. When the men refused, citing the company safety directive saying such work should be done without stepping on the screens, they were peremptorily ordered to the company personnel office, disciplined and issued written reprimands for insubordination.

I

Congress provided in the 1970 Act for measures intended to correct unsafe work place conditions *before* any job refusal over danger or employer retaliatory discipline took place.

6. The employee's death resulted in the company's being cited for violation of OSHA's general duty clause, 29 U. S. C. § 654(a)(1). As of this writing, over four years later, the company's citation is still in administrative litigation.

Under the statute an OSHA inspector issues a citation, followed by mailed notice of proposed penalty. 29 U. S. C. § 659(a). The employer has 15 days in which to contest the penalty. 29 U. S. C. § 659(b). Administrative proceedings are the responsibility of the Occupational Safety & Health Review Commission. 29 U. S. C. § 659(c). *See* 29 U. S. C. § 661. Judicial Review is available in the courts of appeal. 29 U. S. C. § 660.

The Act also provides for special procedures which can be taken when an employee fears that an "imminent danger" exists at the workplace. An employee who fears imminent danger to himself or to fellow employees must notify the Secretary of the danger. If the Secretary is satisfied that the complaint provides reasonable basis to believe that imminent danger exists, an OSHA inspector may enter the workplace. 29 U. S. C. § 657(f)(1). The inspector can cite the employer for a violation, the normal procedure under the Act, 29 U. S. C. § 657(a); if the inspector finds no violation, he must so notify the employees in writing. 29 U. S. C. § 657(f)(1). If the OSHA inspector believes, however, that there exists imminent danger of death or serious physical harm and that the normal enforcement channels are inadequate, the OSHA inspector must recommend to the Secretary that immediate injunctive relief against the dangerous practices or conditions be sought in an applicable federal court. 29 U. S. C. § 662(a), (b), (c). Employees have the right to petition a federal district court for a writ of mandamus against the Secretary if he wrongfully fails to seek injunctive relief. 29 U. S. C. § 662(d).

The lengthy procedure under the statute, then, requires that the Secretary respond to worker's notice, that the OSHA inspector conclude that the danger cannot be prevented through normal enforcement procedures, that the Secretary agree with the inspector's conclusion, and that the federal district court agree to issue the injunction.

Although the Act is designed to protect workers, their role in enforcing the Act is indirect. Employees have the right to

complain to the Secretary about hazardous conditions, and to provide information to the inspector during the investigation. 29 U. S. C. §§ 657(e), (f) (2).

In addition, a worker can petition a federal court for mandamus[7] to order the Secretary to seek an injunction should he decline to do so on recommendation of the inspector. Any retaliation against an employee for exercising these or other statutory right is proscribed by 29 U. S. C. § 660(c)(1). As the Secretary notes in the regulation, there exists no general right to refuse work; even when faced with hazardous conditions, one must complain to the Secretary and wait for the OSHA inspector to arrive.

What does the employee do while waiting for the OSHA inspector to arrive? Or what if an inspector is unavailable? For example, in *Whirlpool*, the disciplining of the employees who refused to work out of fear for their lives took place at 11:00 at night. Under the Secretary's regulation the question as to whether an OSHA inspector was readily available at that hour would become an issue of fact for the District Judge. Where an employee reasonably fears that he is in imminent danger and alternative relief is unavailable, the regulation allows him to refuse to perform that hazardous work and provides a subsequent due process remedy if there is retaliation from the employer. We must examine whether this regulation can be properly implied from the Act.

II

Our question is whether the legislative history of this Act, its stated purposes and its allocation to the Secretary of power to implement its purposes by regulation serve to validate the regulation quoted above.

7. Since the writ of mandamus has been abolished in federal practice, F. R. Civ. Pro. 81(b), the Act presumably contemplates injunctive relief against the Secretary. *See* Oldham, OSHA May Not Work in 'Imminent Danger' Cases, 60 A. B. A. J. 690 (1974).

The statute itself spells out its purposes:

> **§ .651. Congressional statement of findings and declaration of purpose and policy**
>
> (a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—
>
> (1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
>
> (2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
>
> (3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory function under this chapter;

The statute itself delegates broad power to adopt regulations to implement the purposes of the Act:

> (2) The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this chapter, including rules and

regulations dealing with the inspection of an employer's establishment.

29 U. S. C. § 657(g)(2).

The statute itself prohibits employee discharge or discrimination for the exercise of "any right afforded by this chapter":

> **Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief**
>
> (c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

29 U. S. C. § 660(c)(1) (1976).

We conclude that the regulation is a reasonable exercise of the Secretary's authority. As a rule, administrative regulation properly promulgated under statutory authority are presumed valid, *Grubbs* v. *Butts*, 514 F. 2d 1323 (D. C. Cir. 1975); *United States* v. *Boyd*, 491 F. 2d 1163 (9th Cir. 1973). An administrative officer exercising rule making powers delegated to him by Congress may adopt regulations so long as they are reasonable and consistent with the intention of Congress as expressed by the statute. *See United States* v. *Larrionoff*, 431 U. S. 864 (1977); *Manhattan General Equipment Co.* v. *CIR*, 297 U. S. 129 (1936). This deference which we must give to the Secretary's regulations is such that "we need not find that the construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965) *quoting Unemployment Commission* v. *Aragon*, 329 U. S. 143 (1924).

Under *Lilly* v. *Grand Trunk Ry. Co.*, 317 U. S. 481 (1943), it has been axiomatic in federal practice that a statute which

is remedial, intended to protect worker safety, must be given a liberal construction.

> "Since the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a 'narrow or limited construction is to be eschewed.' *St. Marys Sewer Pipe Co.* v. *Director of United States Bureau of Mines*, 262 F.2d 378, 381 (3d Cir. 1959). Rather, this court must interpret the Act liberally in light of its primary purpose."

Rushton Mining Co. v. *Morton*, 520 F. 2d 716, 720 (3d Cir. 1975), *citing Freeman Coal Mining Co.* v. *Interior Bd. of Mine Op. Appeals*, 504 F.2d 741, 744 (7th Cir. 1974). *See also Swinson* v. *Chicago, St. Paul, M. & O. Ry.*, 294 U. S. 529 (1935). Cf. *United States* v. *American Trucking Assns.*, 310 U. S. 534 (1940) (Statutes are to be construed to effectuate Congress' intent).

One need look no further than the Occupational Safety and Health Act's Statement of Purpose, 29 U. S. C. § 651(b), to find the strong remedial basis of this legislation. It is:

> "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions *and to preserve our human resources*"—(emphasis added).

Furthermore, under the Act every employer must "furnish to each of his employees, employment and a place of employment which are free from recognized hazards that are causing, or are likely to cause death or serious physical harm to his employees." 29 U. S. C. § 654. This clause imposed a duty upon employers to furnish a workplace free from recognized deadly hazards.[8] *See Empire Detroit Steel v. O. S. H. R. C.*, 579 F. 2d 378 (6th Cir. 1978); *Brennan* v. *Winters Battery Manuf. Co.*, 531 F. 2d 317 (6th Cir. 1975), *cert. denied*, 425 U. S. 991 (1976).

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8. We additionally note that employees are under a duty to comply with safety and health standards under the Act. 29 U. S. C. § 654(b). In theory, an employee could be cited for continuing to work under hazardous conditions!

That the Act is remedial and has thus been broadly construed by the courts[9] is of great relevance to this inquiry. 29 U. S. C. § 660(c)(1)'s requirement that employers not retaliate against complaining employees should be read broadly, otherwise the Act would be gutted by employer intimidation. Congress was aware of the shortage of federal and state occupational safety inspectors, and placed great reliance on employee assistance in enforcing the Act.[10] Furthermore, it is clear that without employee cooperation, even an army of inspectors could not keep America's work places safe.

Safety and profit are sometimes mutually exclusive. *See Godwin* v. *OSHRC*, 540 F. 2d 1013, 1016 (9th Cir. 1976). In the words of the D. C. Circuit: "Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present." *Phillips* v. *Interior Bd. of Mine Operations Appeals*, 500 F. 2d 722, 778 (D. C. Cir. 1974), *cert. denied*, 420 U. S. 938 (1975).[11]

9. *See, e.g. Baltimore & Ohio R. Co.* v. *O. S. H. R. C.*, 548 F. 2d 1052 (D. C. Cir. 1976).

10. *See* S. Rep. No. 91-1282, 91st Cong. 2d Sess. 11-12, 21 *reprinted in* Subcommittee on Labor, the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 (Committee Print June 1971) [hereinafter cited as Legislative History] at 151-52, 161 and *reprinted in* 1970 U. S. Code Cong. & Admin. News pp. 5177, 5188-89, 5198; H. Rep. No. 91-1291, 91st Cong., 2d Sess., 22, 31, *reprinted in* Legislative History at 852, 861; 116 Cong. Rec. 36530, *reprinted in* Legislative History at 399 (Sen. Saxbe).

11. The regulation does not affect the vast majority of responsible employers who would never consider forcing workers to labor under imminently hazardous conditions. Only a handful of irresponsible employers are affected and the regulation may benefit them. If death or injury occurs on the job, the employer faces potential liability under OSHA or state health and safety codes. Indeed, a wilful violation of OSHA which results in death to an employee may subject an employer to criminal prosecution. 29 U. S. C. § 666(e). And since state workmen's compensation statutes are experience-based, the employer would end up paying in the long run as well. *See, e.g.* Ohio Rev. Code §§ 4123.29, 4123.34; *State ex rel. The Zone Cab Corp.* v. *Industrial Comm. of Ohio*, 132 Ohio State 156, 5 N. E. 2d 477 (1936).

Further, to invalidate the regulation would lead to absurd results. Consider the following cases:

1) Employee is faced with imminent hazard on the job. He leaves the job to telephone the local OSHA office and request an immediate inspection. The employer cannot lawfully discharge the employee.

2) Employee is faced with an imminent hazard on the job. He goes to a telephone, but is unable to reach an OSHA inspector, (or there is no telephone available). The worker goes to his car and personally locates an inspector. The worker and the inspector return to the job site. The employer cannot lawfully discharge the employee.

3) Employee is faced with an imminent hazard on the job. He telephones an OSHA inspector, but refuses to subject himself to the perceived hazard until the inspector arrives. Apparently, the employer is free to discharge the employee.

4) Employee is faced with an imminent hazard on the job. He is unable to reach an OSHA inspector by telephone, and has no automobile available to personally look for one (or nearest OSHA inspector is 100 miles away). Instead of conducting a futile quest on foot, the employee resolves to withdraw from the danger and try to locate an inspector later. Apparently, the employer is free to discharge the employee.

These illustrations demonstrate the reason for the Secretary's regulation. The knowledgeable employee who withdraws from the imminent job hazard and immediately take steps to locate an inspector is protected from retaliation. Yet, absent the regulation's protection, the employee who withdraws from the danger but reasonably waits, or must wait, to summon an inspector or for one to arrive, can be fired without recourse—no matter what hazard he faced. The outcome should not hinge

on whether an employee knows enough to keep within OSHA's protections by making obvious efforts to find an OSHA inspector immediately.

In sum, the need to give broad construction to a retaliatory discharge prohibition clause such as § 660(c)(1) is apparent. To do otherwise is to lay a trap for the unwary employee and to strip the employee of vital protection under a statute meant to safeguard him. We should not construe the Act to permit an employer to, in effect, chain a worker to his post under dangerous conditions until the Secretary can take action. To allow this to happen is to allow disasterous results to both employees and employers.

It is significant that other remedial acts passed by Congress contain similar provisions protecting employees against retaliation. These include: The National Labor Relations Act,[12] the Coal Mine Safety and Health Act,[13] Title VII of the Civil

12. 20 U. S. C. § 158 provides:

(a) It shall be an unfair labor practice for an employer—

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act].

13. 30 U. S. C. provided:

(b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

That section was amended by the Federal Mine Safety and Health Amendments of 1977. Now codified at 30 U. S. C. § 815, it provides:

(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter

(Footnote continued on next page.)

Rights Act of 1964,[14] and the Fair Labor Standards Act.[15]

These provisions have been given a liberal construction by the courts. In *NLRB* v. *Scrivener*, 405 U. S. 117 (1972), the Court held that workers who give written sworn statements to NLRB field offices were protected under the NLRA although the statute[16] spoke only of protection for filing charges or

(Footnote continued from preceding page.)

because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or, has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

14. 42 U. S. C. § 2000e-3 provides:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [Act].

15. 29 U. S. C. § 215(a) provides:

. . . it shall be unlawful for any person—

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

16. *See* fn. 12, *supra*.

giving testimony. The statute prohibited employers from "otherwise" discriminating against the exercise of a protected right. This language, coupled with the Act's remedial purpose was sufficient for the Court to grant protection.[17] Similarly, in *Smith* v. *Columbus Metropolitan Housing Authority*, 433 F. Supp. 61 (S. D. Ohio 1977), Judge Duncan broadly construed Title VII's retaliatory conduct prohibitions broadly to protect an otherwise uninvolved employee who refused to cooperate with an employer who was defending discrimination charges filed by discharged Black workers. *See also Rutherford* v. *American Bank of Commerce*, 565 F. 2d 1162 (10th Cir. 1977); *EEOC* v. *Kalir*, 401 F. Supp. 66 (S. D. N. Y. 1975). In *Dunlop* v. *Carriage Carpet Co.*, 548 F. 2d 139 (6th Cir. 1977), this court broadly construed the Fair Labor Standards Act to protect a *former* employee from retaliation, although the statute, on its face, protected only employees. Judge Phillips' opinion for the court concluded with a statement which is equally applicable here:

> To hold otherwise would do violence to the Congressional intent and purposes of the Act and would prejudice the effective enforcement of the Act.

Id. at 147.

Especially analogous is judicial construction of the Coal Mine Health & Safety Act of 1970. In *Phillips* v. *Interior Board of Mine Operations Appeals*, 500 F. 2d 772 (D. C. Cir. 1974), *cert. denied*, 420 U. S. 938 (1975), the court construed that Act to protect an employee who had complained about safety violations to his foreman and was fired for refusing to work under hazardous circumstances. The court reasoned that the employee's conduct was an implied initial step in the

17. This Court's decision in *Hoover Design Corp.* v. *NLRB*, 402 F. 2d 987 (6th Cir. 1968), which narrowly construed § 8(a)(4) of the NLRA cannot survive *Scrivener. See NLRB* v. *Retail Store Emp. U., Local 876*, 570 F. 2d 586, 591 n. 5 (6th Cir. 1978).

complaint process, deserving of protection.[18] The Act's language at the time was similar to OSHA's provision here.[19] *See also Munsey* v. *Morton*, 507 F. 2d 1201 (D. C. Cir. 1974) (remanding to Interior Board of Mine Operations Appeals for reconsideration in light of *Phillips*).

When Congress passed the Federal Mine Safety and Health Amendments of 1977, 30 U. S. C. §§ 801 *et seq.* it amended the statute's retaliatory discharge provisions.[20] The Senate Report stated that it was Congress' wish "to insure the continuing vitality of the various judicial interpretations of [the retaliatory discharge provision] of the Coal Act which are consistent with the broad protection of the bill's provisions . . ." S. Rep. No. 91-181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* 1977 U. S. Code, Cong'l & Admin. News p. 36. The two cases specifically cited with approval by the Committee were *Phillips* and *Munsey*. *Id.*

We note that OSHA specifically protects an employee's exercise of "any right afforded by this [Act]." A right to a hazard-free work place is implicit throughout the Act, and specifically contained in the Act's statement of purpose, *supra*. It is of some significance that the other statutes referred to, *supra*, contain no similar broad language.[21] The above precedents compel that we broadly construe "any right" to include the right to refuse to work in the face of deadly peril under the circumstances outlined in the Secretary's regulation.

18. It is true that the mining company had established a safety complaint procedure the first step of which was for a worker to bring a complaint to the attention of a foreman. The *Phillips*' court took particular notice of this and found resort to the procedure to be protected. *Id.* at 779-81. There is no reason to accord lesser protection to employees of companies without such formal procedures.

19. *See* fn. 13, *supra*.

20. *See* fn. 13, *supra*.

21. The recently amended Coal Mine Safety & Health Act does contain similar broad language. However, at the time of the D. C. Circuit's opinions in *Phillips* and *Munsey*, that Act contained no such language. *See* fn. 13, *supra*. In addition, the Farm Labor Contractor Registration Act also contains similar language. *See* 7 U. S. C. § 2050(a).

We would be free on our own to reach the result of permitting an employee to withdraw from danger, as did the D. C. Circuit in *Phillips* v. *Interior Bd. of Mine Operations Appeals, supra.* Indeed, the situation here is analogous to that in a series of cases which imply civil causes of action from statutes which otherwise do not provide for a specific civil remedy.[22] Here, however, all that we must do is pay traditional deference to the Secretary's rule-making authority. We have no difficulty doing so.

22. It is true that this Circuit has held in *Russell* v. *Bartley,* 494 F. 2d 334 (6th Cir. 1974), that no private cause of action arises from the Occupational Safety and Health Act. *Russell* is in accord with the view of other courts that both the express provisions of the Act (*see* 29 U. S. C. § 653(b)(4)) as well as the overall enforcement scheme (the Secretary of Labor bringing suits on behalf of aggrieved employees) indicated that Congress meant that no private cause of action for damages should arise. *See e.g. Skidmore* v. *Travelers Ins. Co.,* 356 F. Supp. 670 (E. D. La.), *aff'd* 483 F. 2d 67 (5th Cir. 1973).

The policy factors which underly cases allowing implied causes of action are applicable here, however. "It is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose." *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964).

The general rule to be applied was well stated by Judge Learned Hand in *Reitmeister* v. *Reitmeister,* 162 F. 2d 691, 694 (2d Cir. 1947), when he implied a private cause of action arising from a violation of § 605 of the Federal Communications Act:

> Although the Act does not expressly create any civil liability, we can see no reason why the situation is not within the doctrine which, in the absence of contrary implications, construes a criminal statute, enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal.

Especially relevant is *Wyandotte Co.* v. *United States,* 389 U. S. 191 (1967), where the Court implied a civil remedy because the criminal remedy expressly authorized by the statute was inadequate to ensure the statute's effectiveness. 389 U. S. at 202. Of course, a court will not imply remedies from a statute under all circumstances. *Cort* v. *Ash,* 422 U. S. 66 (1975), and *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453 (1974), indicate that no remedy will be implied if the statute was not designed to protect the class seeking the particular remedy, or if the remedy would be inconsistent with the overall scheme of the statute, or if the remedy is unnecessary to effectuate the Congressional policy underlying the statute. None of these factors is present here.

The Secretary has promulgated a regulation which is in no way inconsistent with the Act's purposes or the statutory scheme. On the contrary, as indicated above, the regulation performs a vital function in rounding out the Act's enforcement provisions. In sum, other things being equal, this regulation must be upheld in light of the deference given administrative interpretations of statutes, the broad reading traditionally given remedial statutes and the broad policy factors which underlie the regulation.[23]

23. This Court requested the parties to brief the question of what additional common law or statutory protections existed in favor of employees who refused to work for fear of their safety. We conclude that other protections are inadequate and that the Secretary's regulation is entirely consistent with what other protections do exist.

Common law tort remedies are extremely limited, at best an employee can sue for on the job injuries after the injury occurs. *See* Prosser on Torts § 80 (4th ed. 1971). Although there have been some recent changes, courts are reluctant to limit an employer's contractual right to discharge an employee. *See Percival* v. *General Motors Corp.,* 539 F. 2d 1126 (8th Cir. 1976). The Oregon Supreme Court has held that although it would be willing to extend common-law protection to employees who complain about safety, there was no need to do so because of OSHA! *Walsh* v. *Consolidated Freightways, Inc.,* 278 Or. 347, 563 P. 2d 1205 (1977). We cannot abdicate our responsibilities under OSHA in the hope that state courts will extend needed protection to workers.

As indicated above, workers do have protection under § 7 of the N. L. R. A. That statute has gaps, however, which OSHA does not have. The N. L. R. A. does not protect agricultural workers or supervisors. *See* 29 U. S. C. § 152(3). Small employers are exempt because the N. L. R. B. does not choose to exercise jurisdiction over them. *See Siemons Mailing Service,* 122 N. L. R. B. 81 (1958). The Secretary's well-drafted supplemental brief cites estimates that the N. L. R. A. covers 44 million employees and OSHA 64 million. Supp. Memorandum at 11.

Additionally, if a solitary employee withdraws from a work hazard, there is doubt that he will be protected under the N. L. R. A. The N. L. R. B. has squarely found protected activity where a solitary employee complains about work safety and files a complaint with OSHA. *Jim Causley Pontiac,* 232 N. L. R. B. No. 37 (1977); *B&P Motor Express, Inc.,* 230 N. L. R. B. No. 96 (1977); *Alleluia Cushion Co.,* 221 N. L. R. B. 999 (1975). The "implied concert" theory on which these decisions are based, however, has received a cold reception in some Courts of Appeal. *See N. L. R. B.* v. *C. & I. Air Conditioning,* 486 F. 2d 977 (9th Cir. 1973); *N. L. R. B.* v.

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III.

Defendants, however, argue that all things are not equal, because the legislative history is clear that Congress did not mean to extend to employees the rights given to them by the regulation. It is to this question that we must now turn.

The district courts below ruled, and the corporate defendants maintain, that the Act's legislative history evidences clear intent by Congress that employees not be allowed to walk off the job when faced with a dangerous situation. It is undisputed that the regulation which the Secretary has enacted was never directly addressed by Congress. The critical issue to be discussed, therefore, is whether we can infer from the Occupational Safety and Health Act's legislative history a specific Congressional will which is irreconcilable with the Secretary's regulation here.

Defendants seek to make this showing by pointing to two events which took place while Congress was considering the Act: 1) Congressional rejection of an ill-fated House bill which would have allowed employees subject to certain toxic substances on the job to withdraw and still be paid; 2) Congressional rejection of administrative shut down proposals. Defendants state that these events amount to an implicit declaration by Congress that the regulation in question cannot stand.

We begin our study of the legislative history of the Occupational Safety and Health Act with the so-called Daniels Bill,

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Northern Metal Co., 440 F. 2d 881 (5th Cir. 1971). *Compare N. L. R. B.* v. *Brown*, 546 F. 2d 690 (6th Cir. 1976).

It is clear, moreover, that the remedies afforded a discharged employee under OSHA and the N. L. R. B. are coextensive. The *Alleluia Cushion Co.*, line of cases, *supra*, demonstrates that no clash exists between them.

See generally Ashford & Katz, Unsafe Working Conditions: Employee Rights under the Labor Management Relations Act and the Occupational Safety & Health Act, 52 Notre Dame Lawyer 802 (1977).

H. R. 16785 (1970),[24] which was reported out of the House Education and Labor Committee. The Daniels Bill contained a subsection, 19(a)(5), which allowed employees to absent themselves from their job, with pay, when exposed to substances which had a potentially toxic or harmful effect when found or used at certain levels in the work place, unless their employer provided appropriate warning labels and protective equipment which allowed them to carry out their work without being harmed.[25] Opponents of the Bill attacked this subsection as

24. For text of this bill, *see* Legislative History at 721.

Four bills had been originally introduced in the House of Representatives in 1969; The Administration bill (H. R. 13373), *reprinted in* Legislative History at 679, Representative Hathaway's bill (H. R. 843), *reprinted in* Legislative History at 599, Representative O'Hara's bill (H. R. 3809), *reprinted in* Legislative History at 629; and Representative Perkins' bill (H. R. 4294), *reprinted* in Legislative History at 659.

H. R. 16785 (1970), Representative Daniels' bill, was introduced on April 7, 1970, and emerged from the House Education and Labor Committee three months later. This bill was supported by organized labor. Thwarted in committee, congressmen opposed to the bill rallied around H. R. 19200 (1970), *reprinted in* Legislative History at 763, which was introduced in September of 1970 as an alternative to the Daniels' bill.

25. This section provided:

> "The Secretary of Health, Education and Welfare shall publish within six months of enactment of this Act and thereafter as needed, but at least annually, a list of all known or potentially toxic substances and the concentrations at which such toxicity is known to occur; and shall determine following a request by any employer or authorized representative of any group of employees whether any substance normally found in the working place has potential toxic or harmful effects in such concentration as used or found; and shall submit such determination both to employers and affected employees as soon as possible. Within sixty days of such determination by the Secretary of Health, Education and Welfare of potential toxicity of any substance, an employer shall not require any employee to be exposed to such substances designated above in toxic or greater concentrations unless it is accompanied by information, made available to employees by label or other appropriate means, of the known hazards or toxic or long-term ill effects, the nature of the substance, and the signs, symptoms, emergency treatment and proper conditions

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guaranteeing workers the right to "strike with pay," a label which proved to be its downfall. Unhappy with this and other provisions in the Daniels Bill, Congressman Steiger of Wisconsin introduced a substitute bill on the floor of the House which *inter alia* did not contain a "strike with pay" provision. *See* H. R. 19200 (1970), *reprinted in* Legislative History at 763.

Confronted with strong opposition on a variety of grounds,[26] Congressman Daniels responded, *inter alia*, by offering to delete

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and precautions of safe use, and personal protective equipment is supplied which allows established work procedures to be performed with such equipment, or unless such exposed employee may absent himself from such risk of harm for the period necessary to avoid such danger without loss of regular compensation for such period." H. R. 16785 § 19(a), (1970), *reprinted in* Legislative History at 755-56, and *reprinted in* H. Rep. No. 91-1291, 91st Cong., 2d Sess. 12 (1970), *reprinted in* Legislative History at 842.

The Committee's accompanying report provides an explanation for this provision:

> "Because any workable solution to covering new [toxic] substances would have to be fast-acting and self-enforcing, the Committee adapted a two-step process whereby workers or employers could submit unknown substances to the Department of Health, Education and Welfare for a determination of their toxicity. Only after the Department of Health, Education and Welfare made a determination that a substance was toxic would employees have a right to information about these substances or a right to necessary protective equipment, if any. To assure these rights, the bill guarantees that employees may not be forced to work without these safeguards. There is still a real danger that an employee may be economically coerced into self-exposure in order to earn his livelihood, so the bill allows an employee to absent himself from that specific danger for the period of its duration without loss of pay. However, the Committee intends that the danger cannot be deliberately caused by the employee. The Department of Labor will implement this intent. Nothing herein restricts the right of the employer, except as he is obligated under other agreements, to assign a worker to other non-prohibited work during this time. This should eliminate possible abuse by allowing the employer to avoid payment for work not performed." H. Rep. No. 91-1291, 91st Cong., 2d Sess. 29-30 (1970), *reprinted in* Legislative History at 859-860.

26. It must be emphasized that the controversy over which Occupational Safety and Health bill to enact did not center on the "strike

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his bill's alleged "strike with pay" provision and offering to substitute a provision giving employees the right to request that the Secretary immediately inspect the premises.[27] He explained:

> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk or harm; instead, we have this amendment which enables employees subject to a risk of harm to

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with pay" provision. An examination of the legislative history reveals that the principal opposition of republicans to the labor-supported bills which emerged from Committee in both the Senate and the House concerned: 1) Which agency was to set health and safety standards, 2) Whether an independent adjudicatory body should be established to administratively review violations, 3) Whether employers should be subject to a general requirement to provide a safe and healthful work environment, 4) Whether the Secretary of Labor should have authority to order administrative shutdowns in cases of imminent danger (discussed *infra*).

See, e.g., H. Rep. No. 91-1291, 91st Cong., 2d Sess. 47-60 (1970), *reprinted in* Legislative History at 877-890; S. Rep. No. 91-1282, 91st Cong., 2d Sess. 54-64 (1970), *reprinted in* Legislative History at 193-203 and *reprinted in* 1970 U. S. Code, Cong'l & Admin. News pp. 5218-5227.

27. The proposed addition provided:

> Any employees or representative of employees who believe that a violation or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear on any record published, released, or made available pursuant to this Act. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violations or danger exist. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify in writing the employees or representative of the employees of such determination."

116. Cong. Rec. 23645 *reprinted in* Legislative History at 1008.

> get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to the risk of harm.

116 Cong. Record, 38377-78 (1970), *reprinted in* Legislative History at 1009. *See also* 116 Congressional Record 38369 (1970), *reprinted in* Legislative History at 986 (Congressman Perkins); 116 Congressional Record 38376 (1970), *reprinted in* Legislative History at 1005 (Congressman Daniels).

Notwithstanding Representative Daniels' efforts to make his bill more palatable,[28] the House voted it down[29] and instead passed the alternative Steiger bill. That bill said nothing about employees walking off the job, but allowed the Secretary to obtain temporary restraining orders from a Federal Court to enjoin imminent dangers in a workplace. If the Secretary unreasonably failed to seek this relief, an employee who was injured as a result could sue the United States in the Court of Claims.[30]

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28. The Secretary also argues that because Representative Daniels amended his bill to remove the alleged "strike with pay" language, the vote between his bill and the Steiger bill was one in which *neither* bill had any provision concerning this issue. Br. for the Sec'y at 30 n. 13. The legislative history, however, is clear that Representative Daniels' proposed amendments were never acted upon and that it was his original bill which was voted down in favor of the Steiger bill. *See* 116 Cong. Rec. 38369-70 (1970), *reprinted in* Legislative History at 985-986 (Congressman Perkins); 116 Cong. Rec. 38375-78, *reprinted in* Legislative History at 1006-1010 (Congressman Daniels); 116 Cong. Rec. 38704-05, *reprinted in* Legislative History at 1064 (Congressman Perkins); 116 Cong. Rec. 38705, *reprinted in* Legislative History at 1065 (Congressman Daniels); 116 Cong. Rec. 38707, *reprinted in* Legislative History at 1072 (Congressman O'Hara); 116 Cong. Rec. 38714, *reprinted in* Legislative History at 1089 (Congressman Horton).

29. *See* 116 Cong. Rec. 38723, *reprinted in* Legislative History at 1112-15.

30. In relevant part, the bill provided:

> SEC. 12. (a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any

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Action in the Senate began with the reporting out of Committee of the Williams Occupational Safety and Health Bill.[31] The Williams Bill did not contain a "strike with pay" provision. However, it did provide that in imminent danger situations, an employee had the right to make a written request for an immedi-

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> conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.
>
> (b) Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to section 11 of this Act. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.
>
> (c) Whenever and as soon as an inspector concludes that conditions or practices described in subsection (a) exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Secretary that relief be sought.
>
> (d) If the Secretary unreasonably fails to petition the court for appropriate relief under this section and any employee is injured thereby either physically or financially by reason of such failure on the part of the Secretary, such employee may bring an action against the United States in the Court of Claims in which he may recover the damages he has sustained, including reasonable court costs and attorney's fees.
>
> (e) In any case where a temporary restraining order is obtained under this section by the Secretary, the court which grants such relief shall set a sum which it deems proper for the payment of such costs, damages, and attorney's fees as may be incurred or suffered by any employer who is found to have been wrongfully restrained or enjoined. In no case shall any employer wrongfully restrained or enjoined be entitled to a recovery for costs, damages, and attorney's fees in excess of the sum set by the court.

H. R. 19200, 91st Cong. 2d Sess. (1970), *reprinted in* Legislative History at 796-798, 1101-1102. *Contrast* Congressman Daniels proposed amendment, *supra* at fn. 27.

31. S. 2193 (1970), *reprinted in* Legislative History at 204.

ate inspection.[32] Although the Williams bill had some controversial provisions,[33] it survived intact and passed the Senate.

In House-Senate Conference, the Senate was largely successful in retaining the provisions of the Williams bill. In particular, the Senate's provision, giving employees the additional right to contact the Secretary and to get an inspector on the scene at once was acceded to by the House.[34] Conference Report No. 91-1765, *reprinted in* Legislative History at 1154, 1164-65; 1190-1191 and *reprinted in* 1970 U. S. Code Cong'l and Admin. News

32. In relevant part, the Williams' bill provided:

"Any employees or representatives of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, and shall set with reasonable particularity the grounds for the notice, and shall be signed by the employees or representatives of employees, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear on any records, published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification, the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violations or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists, he shall notify in writing the employees or representative of the employees of such determination." S. 2193 § 8(f)(1), (1970), *reprinted in* Legislative History at 252-253.

33. Opposition centered around the bill's provisions setting standard-making and adjudication in the Secretary of Labor and the bill's authorization of administrative shutdowns. S. 2193 §§ 6, 10c, 11 (1970). The controversy is fully aired in the Senate Report, S. Rep. No. 91-1282, 91st Cong., 2d Sess. 54-64 (1970), *reprinted in* Legislative History at 193-203 and *reprinted in* 1970 U. S. Code, Cong'l & Admin. News pp. 5218-5227. *See generally* the debate on the Senate Floor on October 14 and November 16, 17, 1970, *reprinted in* Legislative History at 407-528.

34. As noted above, *see* fn. 27 and accompanying text, in response to opposition to the so-called "strike with pay" provision, Representative Daniels also offered an amendment to his bill which would have given employees subject to imminent danger the right to summon an OSHA inspector into the situation promptly.

5228, 5334. The Act as finally adopted incorporates this compromise. 29 U. S. C. § 657(f).

Defendants would have us characterize this series of events as indicating a specific determination by Congress that employees did not have the right to walk out, but instead had only the right to bring the Secretary on the scene to investigate an allegedly imminently hazardous situation. We disagree. Initially, we note that the "strike with pay provision" of the original Daniels Bill in the House, was quite different from the regulation here in question. The proposal in Congressman Daniels' bill dealt with the problems of increasing concentrations of toxic substances, not immediate hazards of all kinds to both health and safety. The walk-off-the-job provision in that bill did not require an imminent threat to life, and required sixty days of employer inaction and a certification by the Secretary that the substance in question was indeed toxic. This curiously circumscribed provision was quickly saddled with the sobriquet "strike with pay."

Crucial to an understanding of Congressional opposition is the term "with pay." As the Court noted in *Usury* v. *Babcock and Wilcox Co.*, 424 F. Supp. 753, 756 (E. D. Mich. 1976), it is obvious that Congress' concern was specifically aimed against workers walking off the job with pay. No mention whatever was made of workers' rights' to refuse to perform dangerous work assignments without pay. The very fact that the section was misentitled "strike with pay" and was constantly referred to as such[35] is the clearest indication possible that Congress was

35. We consider it significant that *every time* that the question of employees walking off the job was addressed, it was always in the "with-pay" context. Senator Williams stated that ". . . the committee bill does not contain a so-called strike-*with-pay* provision," because of the "possibility for endless disputes over whether employees were entitled to walk off the job *with full pay* . . ." 116 Cong. Rec. 37326, *reprinted in* Legislative History at 416. Representative Perkins spoke on the House floor of the offer to delete "[t]he provision that would have permitted an employee to absent himself from exposure to a toxic substance *without loss of pay*, the so-called *'strike with pay'* provision . . ." 116 Cong. Rec. 38369, *reprinted in* Legislative

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specifically concerned with the monetary incentive that workers would have by claiming that they believed a situation was hazardous and then sitting back and collecting their paychecks for doing nothing.

It is easy to understand why Congressman Daniels stated that this provision had been "misunderstood" and why he offered to drop it. There is no indication that this provision was ever viewed as the equivalent of the regulation which here allows the worker to protect himself from imminent danger to both health and safety.

Defendant Detroit Steel finds it significant that Representative Daniels' proposed amendments to his bill would have both deleted the so-called "strike with pay" provision and substituted in its place a provision giving employees subject to an imminent danger the right to summon an OSHA inspector into the plant at once. Since Representative Daniels' proposed amendment was

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History at 986. Representative Daniels initially stated that ". . . the provision in the committee bill which has been frequently misinterpreted as a *'strike with pay'* provision has also been deleted." 116 Cong. Rec. 38376, *reprinted in* Legislative History at 1005. He subsequently explained that this provision would have permitted "employees to absent themselves from dangerous situations *without loss of pay*." 116 Cong. Rec. 38378, *reprinted in* Legislative History at 1009. He further went on to state that "the provision on employees *not losing pay* was so generally misunderstood that we have decided to drop it. We have no provisions *for payment* of employees who want to abstain themselves from risk of harm." 116 Cong. Rec. 38378, *reprinted in* Legislative History at 1009.

There were four other references to the provision in the legislative history, Representatives Randall, Feigham and Horton echoed: "The provision that has been attacked as giving employee [sic] the right to *'strike with pay'* will be deleted." 116 Cong. Rec. 38378, 38390, 38714, *reprinted in* Legislative History at 101, 1046, 1089. Also, Representative Daniels additionally stated in later argument on the House floor "[w]e have deleted a provision which was—though inaccurately—called a 'strike *with pay*' provision and have provided that employees may request an inspection when they are subjected to dangers at the work-place." The above references clearly demonstrate Congress' preoccupation with paying people to walk off the job. (emphasis supplied throughout).

never acted upon,[36] we decline to accord significance to this event. Even granting Detroit Steel's argument, there is no indication that Congressman Daniels, or Congress, contemplated the problem which the regulation addresses.

It is established law that employees have the right to strike in this country. Employees are specifically permitted to walk off the job without reprisal under Federal Labor Law in two instances.[37] First, where such conduct can be deemed concerted activity under § 7 of the National Labor Relations Act, 29 U. S. C. § 157. *See N. L. R. B.* v. *Washington Aluminum Co.*, 370 U. S. 9 (1962); *N. L. R. B.* v. *Leslie Metal Arts Co.*, 509 F. 2d 811 (6th Cir. 1975); *N. L. R. B.* v. *KDI Precision Products Inc.*, 436 F. 2d 385 (6th Cir. 1971). *See also Eastex, Inc.* v. *N. L. R. B.*, 46 U. S. L. W. 4783 (U. S. June 20, 1978). Second, where there exists a collective bargaining agreement prohibiting strikes and mandating arbitration of grievances, refusal of employees to work under hazardous conditions is not an illegal strike. § 502 of the Taft-Hartley Act, 29 U. S. C. § 143. *See N. L. R. B.* v. *Knight Morley Corp.*, 251 F. 2d 753, (6th Cir.), *cert. denied*, 357 U. S. 927 (1957), Cf. *Gateway Coal Co.* v. *UMW*, 414 U. S. 368 (1974), (standard to be used is objective); *Plain Dealer Publishing Co.* v. *Cleveland Typo Union #53*, 520 F. 2d 1220, 1229 (6th Cir. 1975) (adopting district court opinion) (applying objective standard and finding legitimate fear of violence prevented employees from crossing picket lines).

Congress was well aware that workers covered by the National Labor Relations Act possessed the right to strike over unsafe working conditions.[38] It is only when one adds the additional element of being paid to strike that Congressional opposition

36. *See* fn. 28, *supra.*

37. *See also* fn. 23, *supra.*

38. Indeed, explicit reference to this was made on the House floor. 116 Cong. Rec. 422 (1970), *reprinted in* Legislative History at 1223-24 (Rep. Sherle).

comes into focus.[39] This is apparent from Senator Williams' statement when he introduced his bill on the Senate Floor:

> "I should also add, despite some widespread contentions to the contrary, that the Committee bill does not contain a so-called strike *with pay* provision. Rather than raising a possibility for endless disputes whether employees were entitled to walk off the job *with full pay*, it was decided in committee to enhance the prospects of compliance by the employer through such means as giving the employees the right to request a special Labor Department investigation or inspection." (Emphasis added).

116 Cong. Rec. 37326, *reprinted in* Legislative History at 416. Senator Williams was not concerned over whether employees could walk off the job in the face of hazardous working conditions; his concern was clearly directed to the added incentive of full pay.

The second aspect of the legislative history which defendants urge in support of their position surrounds the legislative evolution of the "imminent danger" provisions of the Act, 29 U. S. C. § 662. In the House, the original Daniels' bill allowed OSHA inspectors to issue administrative orders for up to five days which would "prohibit the employment or presence of any individuals in locations or under conditions where such imminent danger exists, except to correct or remove it." H. R. 16785, 91st Cong., 2d Sess. § 23(a) (1970), *reprinted in* Legislative History 893, 955-56. *See also* the accompanying Committee report H. R. No. 11291, 91st Cong'l 2d Sess., 25 (1970), *reprinted* in Legislative History at 855. (provision modeled after the principles of the New York State Health and Safety Code). United States District Courts, upon application by the Secretary, had the authority to enjoin business operations for greater periods of time. *Id.* The alternative Steiger bill gave the courts exclusive

39. Compare the "political hot potato" of whether a state can pay unemployment benefits to striking workers. *See New York Tel Co.* v. *New York State Dept. of Labor,* 566 F. 2d 388, 394 (2d Cir. 1977), *cert. granted,* ..... U. S. ..... (1978).

authority to enjoin violations, upon application of the Secretary.[40] H. R. 19200, 92nd Cong., 2d Sess. § 12 (1970), *reprinted in* Legislative History at 796-98. As noted, it was this latter bill which the House adopted.

The Williams Bill in the Senate contained an imminent danger provision which authorized an OSHA inspector under certain circumstances, to issue an order restraining an employer's business operations for up to 72 hours.[41] This authority could only be exercised if the Secretary had insufficient time to get a court ordered injunction and the Secretary was required to provide certain review procedures to help minimize arbitrary abuse.[42]

When the Senate bill (the Williams bill) and the House bill (the Steiger bill) were submitted to a conference committee, the Senate receded from its provision permitting OSHA inspectors to issue 72 hour administrative restraining orders.[43]

40. In additional response to the Steiger Bill, Representative Daniels also offered to amend his bill to "rely exclusively on judicial remedies to counteract these imminent dangers. Our provision is now identical to that in the Steiger substitute." 116 Cong. Rec. 38376, *reprinted in* Legislative History at 1005.

41. S. 2193 § 12 (1970), *reprinted in* Legislative History at 561-64. *See* S. Rep. No. 91-1282, 91st Cong., 2d Sess. 12-13 (1970), *reprinted in* Legislative History at 152-53, *and reprinted in* 1970 U. S. Code Cong'l and Admin. News pp. 5819-90.

42. The drastic administrative shut down provisions in the original Williams bill, S. 2193, 91st Cong., 1st Sess., § 6(a)(2) (1969), *reprinted in* Legislative History at 1, 12-13, were modified in committee to a 72-hour maximum period and required concurrence by a regional Labor Department official. S. 2193, 91st Cong., 2d Sess., § 11(b) (1970), *reprinted in* Legislative History at 263-64. *See* S. Rep. No. 91-1282, 56-57 (1970), *reprinted in* Legislative History at 195-96, and *reprinted in* 1970 U. S. Code Cong'l & Admin. News, p. 5221 (Minority views of Senator Javits). An effort on the Senate floor to entirely eliminate administrative shutdowns, spearheaded by Senator Saxbe, fell short by only two votes. *See* 116 Cong. Rec. 37601-05 (1970) (roll call vote, and debate), *reprinted in* Legislative History at 451-61. However, additional safeguards were added to further minimize abuse—written notice and concurrence of a cabinet or sub-cabinet level official for plant closings. *See* 116 Cong. Rec. 37624, *reprinted in* Legislative History at 508-09.

43. H. Rep. No. 1765, 91st Cong., 2d Sess. 40 (1970), *reprinted in* Legislative History at 1193, *and reprinted in* 1970 U. S. Code Cong'l & Admin. News 5236.

Thus, the Act as finally passed contained no administrative shut down authority. Defendants argue that Congress could not have meant to give shut down authority to employees which it declined to give to inspectors.

Proper analysis of Congressional rejection of the Senate shut down provision must begin with the disputed section itself:

> If the Secretary determines that the imminence of a danger referred to in subsection (a) is such that immediate action is necessary, and the Secretary determines that there is not sufficient time, in light of the nature and imminence of the danger, to seek and obtain a temporary restraining order or injunction under subsection (a) of this section, the Secretary shall issue an order requiring such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibiting the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger, or to maintain the capacity of a continuous process operation to restart without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner. Such order may remain in effect for not more than seventy-two hours from the time of its issuance. If the Secretary delegates his authority to issue such an order to close a business or plant, in whole or in substantial part, he shall provide that such an order may not be issued until the employer has been notified in writing signed by the delegate of the Secretary, setting forth specifically the nature and imminence of the danger compelling immediate action and the concurrence of an official of the Labor Department appointed by the President with the advice and consent of the Senate is first obtained. The Secretary shall by regulation provide appropriate procedures whereby an employer may obtain expeditious informal reconsideration by officials of the Department of Labor of any order issued under this subsection.

S. 2193 § 12(b) (1970), *reprinted in* Legislative History at 562-63.

This provision is in no way similar to the regulation promulgated by the Secretary of Labor.[44] Section 12(b) allowed an official to close down an entire plant. Further, on the spot changes could be ordered solely on authority of an OSHA inspector. Apparently, only if a shut down order would close

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44. Detroit Steel argues that the following statement by Senator Williams shows that his bill provided for 72 hour shut downs in lieu of employee walking off the job:

> The committee bill, while guarding against frivolous complaints, permits employees or their representatives to request inspections where they believe that a violation of a safety and health standard exists that threatens physical harm or that an imminent danger exists.
>
> The substitute bill has absolutely no comparable provision for what in so many clearly life and death instances is the minimum assurance to which the employee is entitled.

116 Cong. Rec. 37340-41, *reprinted in* Legislative History at 432-33.

This statement arose when the Senate was considering choosing between Senator Williams' bill and a rival bill which was sponsored by Senator Peter Dominick, S. 4404, 91st Cong., 2d Sess. 1970, *reprinted in* Legislative History at 73.

This statement was made in the heat of debate; it was Senator Williams' ninth reason why his bill was superior to the alternative bill. Senator Williams' tenth reason went as follows:

> Tenth. The Committee bill provides that in imminent danger situations the Secretary may bring action in the appropriate U.S. district court for a temporary restraining order or an injunction requiring steps to be taken to correct, remove, or avoid the danger, and prohibiting the presence of individuals where the imminent danger exists.
>
> However, the bill authorizes the continued presence of individuals necessary to the correction or removal of the danger or to maintain the capacity of a continuous process operation to restart without a complete cessation of operations, and to permit any necessary shutdown of operations to be accomplished in a safe and orderly manner.
>
> The committee bill also permits the Secretary, if he determinues that the danger of death or serious harm is so immediate that action must be taken without awaiting the institution of court proceedings, to order such action to be taken and his order may remain in effect for 72 hours.
>
> This is one of the areas in which there is clearly a distinction between the bill as reported by the committee and the substitute

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a plant "in substantial part" did the inspector need to get permission from higher-ups.[45]

It is apparent from an examination of the legislative history that Congressional concern was directed to the possibilities of abuse of authority which lurked behind administrative shut downs. The provision was branded as unconstitutional.[46] Particular fears were voiced over the pressures which could be brought to bear on an inspector during a strike.[47] One can

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proposed. These are the true emergency situations where time manifestly is of the essence.

It is clear that Senator Williams' statement, in context, is consistent with the Secretary's regulation. Even if the opposite were true, the invidious comparison he drew between his bill and Senator Dominick's bill, in the frenzy of argument, is deserving of little weight in determining the meaning of his bill.

45. *See* 116 Cong. Rec. 37624, *reprinted in* Legislative History at 508 (Sen. Javits).

46. H. Rep. No. 1291, 91st Cong., 2d Sess. 56, *reprinted in* Legislative History at 886 (minority views) ("In essence, the exercise of this shut-down power amounts to summary punishment which is contrary to our established standards of law"); 116 Cong. Rec. 37602, *reprinted in* Legislative History at 453 (Sen. Schweiker) (". . . we must be sure that due process is observed through a judicial hearing"); 116 Cong. Rec. 38393, *reprinted in* Legislative History at 1050 (Rep. Michel); 116 Cong. Rec. 38702, *reprinted in* Legislative History at 1058 (Rep. Steiger); 116 Cong. Rec. 37338, *reprinted in* Legislative History at 425 (Sen. Dominick) ("all he has to do—one man, as an inspector—is to call the regional office or somebody else in the Labor Department and shut down the whole plant immediately, by an order, without any court findings, without any adjudication, without any due process."); 116 Cong. Rec. 37602, *reprinted in* Legislative History at 453 (Sen. Schweiker); 116 Cong. Rec. 37604, *reprinted in* Legislative History at 458 (Sen. Schweiker) ("I do not see why we cannot assure that due process is available before a lot of people are thrown out of work or an enterprise is shut down.")

47. *See* H. Rep. No. 91-1291, 91st Cong. 2d Sess. 56 (1970), *reprinted in* Legislative History at 886 (minority views) (". . . the all powerful inspector would become a pawn in labor disputes. . . . and in many cases he would be requested to inspect a plant simply to harass or intimidate employers."); 116 Cong. Rec. 38393, *reprinted in* Legislative History at 1050 (Rep. Michel); 116 Cong. Rec.

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easily discern the scenarios which Congress feared—an inspector confronting company officials with on the spot demands backed up by threats of partial shutdown. Or, striking workers pressuring an inspector to shut down a section of a plant manned by strikebreakers.

What Congress feared was arbitrary governmental authority brought to bear on an employer to take certain action. This is quite different from allowing workers to save themselves from apparent imminent harm. A vulnerable or misguided federal inspector might abuse his authority. Allowing an employee or group of employees to reasonably refuse to subject themselves to danger under this regulation presents no similar abuse possibilities. The employee cannot affirmatively order any changes; the fear of danger must be objectively reasonable and must be *subsequently* found such by the Courts; there must be insufficient time to go through normal enforcement channels; if no other work is available, the employee loses his/her pay. Thus, the regulation carefully restricts the exercise of the right it affords. In contrast § 23(b) imposed minimal curbs to protect against an abitrary inspector.[48] It was this inherent lack of control over a potentially abusive bureaucrat at which Congress recoiled.

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38374, *reprinted in* Legislative History at 1052 (Rep. Bloomfield) (". . . Labor Department inspector . . . may choose to shut down a plant arbitrarily and may be influenced by business or union pressure"); 116 Cong. Rec. 37346, *reprinted in* Legislative History at 448 (Sen. Tower) ("power . . . could easily be abused, culminating in a breakdown of existing Governmental neutrality in labor-management relations").

48. *See* fn. 45 and accompanying text.

As indicated in fn. 42, Congress kept adding more and more restrictions on the Secretary's proposed shut down powers, only to conclude in the end that the restrictions were insufficient and the power should be taken away entirely.

Filing suit against the inspector, of course, would be an ineffective after-the-fact gesture subject to an immunity defense. *See Butz* v. *Economou,* 98 S. Ct. 2894 (1978); *Granger* v. *Marek,* 583 F. 2d 781 (6th Cir. 1978).

The Secretary's regulation at issue in this case does not authorize self-help to pay without work. Under the regulation an employee who faces urgent danger of "life or serious injury" may do what the Thirteenth Amendment to the Constitution also allows. He may leave the job. If he does, however, the employer may discharge him. At that point not only does his pay cease, but he may have lost (possibly forever) many previously acquired seniority and pension rights. The regulation provides equitable relief to him when the Secretary has decided to file a complaint and there has been due process adjudication. At trial he must prove before a federal judge 1) his good faith in taking the action, 2) that he had no reasonable alternative, and 3) that his apprehension of death or serious injury was based on circumstances then facing him which would cause a reasonable person to reach the same conclusion, and 4) that the urgency of the situation provided "insufficient time . . . to eliminate the danger by resort to regular statutory enforcement channels."

This issue is better seen as presenting a situation in which "the courts must . . . in effect, consider what answer the legislature would have made as to a problem that was neither discussed nor contemplated." *Portland Cement Ass'n* v. *Ruckelshaus,* 486 F. 2d 375, 380 (D. C. Cir. 1973), *cert. denied,* 417 U. S. 921 (1974). As indicated in part II, *supra,* we think it is clear what answer Congress would have given had it directly considered the regulation.

Our conclusion is reinforced because when Congress subsequently directly addressed this question, when considering the Federal Mine Safety and Health Amendments of 1977, 91 Stat. 1290, 30 U. S. C. § 801 *et seq.,* it expressly indicated that a miner could refuse to work if he had a good faith belief that his job would subject him to unsafe or unhealthful working conditions. As here, the Mine Safety and Health Act does not expressly provide for that right.[49] However, that Act's

49. *See* fn. 13, *supra.*

legislative history makes it clear that Congress desired that miners be allowed to withdraw from danger on the job without fear of retaliation. The Senate Report accompanying the Act provides:

> This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

S. Rep. No. 95-181 36 (1977), *reprinted in* 1977 U. S. Code, Cong'l & Admin. News 3401, 3436. Nor can it be said that this issue surreptitiously sneaked by Congress; it was openly raised on the Senate Floor:

> MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10600, the discrimination clause?
>
> It is my impression that the purpose of this section is to insure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves of the protection of the act.
>
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
>
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
>
> MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would

> not be able to afford themselves their rights under the full protection of the act as responsible human beings.

123 Cong. Rec. at S10287-88 (daily ed. June 21, 1977). Similar sentiments were voiced on the House floor:

> If miners are to invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example, *Baker* v. *North American Coal Co.*, 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no "intent" to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.

123 Cong. Rec. at H. 11662 (daily ed. Oct. 27, 1977) (Rep. Perkins). Significantly, our review of the floor debates reveals no controversy whatsoever on this issue, although other provisions of the Act were heatedly debated.[50]

We are aware that this was not the same Congress which passed the Occupational Safety and Health Act. We are also aware that this Act has less far-reaching effect than the Occupational Safety and Health Act.[51] At the same time, we cannot ignore the utter lack of controversy when Congress squarely faced the walk-off-the-job-in-the-face-of-danger issue at a later time. We additionally note the prominent endorsement of the Secretary's position here by three persons who were instrumental in the passage of OSHA—Senators Williams and Javits and Congressman Perkins. We do not think that these gentle-

50. *See* 123 Cong. Rec. S10286-S10305 (daily ed. June 21, 1977); H7184-H7221 (daily ed. July 15, 1977). *See also* House Conference Report No. 95-655, 37-68 (1977), *reprinted in* 1977 U. S. Code Cong'l and Admin. News pp. 3485-3516.

51. As of this writing, OSHA covers all businesses affecting interstate commerce. 29 U. S. C. § 652(5). *See Goodwin* v. *O. S. H. R. C.*, 540 F. 2d 1013 (9th Cir. 1976). The Mine Health and Safety Act covers all mining. 30 U. S. C. §§ 802(h)(1), 803.

men—or Congress—would endorse self-protection for miners and deny that same self-protection to other workers.

IV.

In conclusion, we perceive no mandate in OSHA's legislative history that we deprive American workers of the limited protection afforded them by the regulation. We are persuaded that the regulation is a valid exercise of the Secretary's broad rule-making authority and that it is consistent with the Act and with Congressional intent.

We are aware that our holding places us squarely in conflict with that of the Fifth Circuit in *Marshall* v. *Daniel Construction Co.*, 563 F. 2d 707 (5th Cir. 1977), *cert. denied*, 47 U. S. L. W. 3226 (U. S. Oct. 2, 1978). However we cannot, in good conscience, adopt that court's reasoning. Instead, we find ourselves in full agreement with Judge John Minor Wisdom's dissent in that case and with his conclusion that the same Congress which wanted employees to work in safe and healthful surroundings could not have meant for them to die at their posts. A worker should not have to choose between his job and his life without the reasonable safeguard provided by this regulation.

The judgments below are reversed and remanded for further proceedings. The district judge's findings of fact in No. 76-2144 are affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

RAY MARSHALL, Secretary of Labor,
Appellant,

vs.

WHIRLPOOL CORPORATION and EMPIRE-DETROIT STEEL DIV. DETROIT STEEL CORP.,
Appellees.

Nos. 76-2143 and 76-2261

WHIRLPOOL CORPORATION,
Cross-Appellant,

vs.

RAY MARSHALL, Secretary of Labor,
Cross-Appellee.

No. 76-2144

Filed Apr. 4, 1979
John P. Hehman, Clerk

ORDER.

Before: EDWARDS, *Chief Judge*, KEITH and MERRITT, *Circuit Judges*

The Whirlpool Corporation and Empire-Detroit Steel Division of Detroit Steel Corporation have both filed Petitions for Rehearing and Suggestions for Rehearing en banc. No active Circuit Judge having voted for en banc consideration, the Petitions have been referred to the hearing panel for disposition.

In its Petition for Rehearing, the Whirlpool Corporation suggests that our concern with the validity of the regulation may have caused us to give inadequate consideration to its factually-oriented cross-appeal relating to the validity of the district court's findings. However, as we noted in fn. 5 of our opinion, we did carefully examine the record and concluded that there was "ample support" for the district court's findings of fact. Nothing in Whirlpool's Petition for Rehearing persuades us to retreat from that position.

Detroit Steel's Petition for Rehearing basically presents two separate questions. Detroit Steel first argues that our decision impermissibly expands federal jurisdiction. We think that this argument confuses cause of action with subject matter jurisdiction. Subject matter jurisdiction can only be conferred on a federal court by express Congressional grant. Absent this grant, a federal court has no power to rule on a case. A federally created cause of action, on the other hand, goes to the question whether a party has the right to bring suit. *See Hagans* v. *Lavine*, 415 U. S. 528, 539-43 (1974).

In this case, Congress has conferred subject matter jurisdiction upon the federal courts to adjudicate suits brought by the Secretary of Labor on behalf of employees who have been discriminated against for the exercise of their rights under OSHA. 29 U. S. C. 660(c)(2) specifically states that "the United States district courts shall have jurisdiction, for cause shown to restrain violations of [29 U. S. C. 660(c)(1)] . . ." Thus, 29 U. S. C. 660(c)(2) confers subject matter jurisdiction to determine whether the Secretary has properly stated a valid cause of action under 29 U. S. C. 660(c)(1). In our opinion, we approved a liberal construction of 29 U. S. C. 660(c)(1), which goes to whether the circumstances before us stated a valid cause of action. Although this construction may have the incidental effect of expanding the *number* of cases which the Secretary can file in the federal district courts, it is not an expansion of subject matter jurisdiction. *See also* our discussion of federal

law relating to implied causes of action in footnote 22 of our opinion.

Detroit Steel secondly argues that we failed to consider serious factual deficiencies in the Secretary's case against it. Additionally, Detroit Steel argues that we should have followed *Satterwhite* v. *United Parcel Service, Inc.*, 496 F. 2d 448 (10th Cir. 1974), *cert. denied*, 419 U. S. 1079 (1974), which concluded that where a grievance is subject to arbitration under a collective bargaining agreement, employees may not thereafter maintain a factually identical cause of action under the Fair Labor Standards Act.

These arguments are all premature. The Secretary's action against Detroit Steel was dismissed on the pleadings because OSHA "does not provide a statutory or legal basis for the maintenance of a suit by the plaintiff on behalf of an employee who was disciplined by the Defendant for the employee's refusal to perform assigned work . . ." *See* Entry Granting Defendant's Motion for Summary Judgment, *reproduced in* Joint Appendix at 13. Thus, there is no record below for us to consider specific factual matters. All that we have done is rule that the Secretary stated a valid cause of action against Detroit Steel. It may well be that this suit should be precluded if arbitration took place or that a district court could conclude as a factual matter that the regulation was not violated. We can express no views on these questions since they were not presented to the district court and were not ruled upon by it. Our ruling does not prevent Detroit Steel from making these arguments to the district court on remand, but they are not properly before us now.

Upon consideration, we conclude that the Petitions for Rehearing are without merit. The Petitions for Rehearing are, in all respects, Denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Ohio
Western Division

W. J. USERY, Secretary of Labor,
Plaintiff,

vs.

WHIRLPOOL CORPORATION,
Defendant.

Civil No. C 74-359

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

YOUNG, J.:

This cause is before the Court on a complaint filed by the Secretary of Labor against the Whirlpool Corporation (hereafter Whirlpool), pursuant to § 11(c) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § 660(c)(1) (hereafter the ACT). The Secretary is seeking lost wages, expungement of written reprimands and injunctive relief for two Whirlpool employees who were allegedly discriminated against due to their refusal to subject themselves to possible serious injury or death arising from a hazardous condition at their workplace.

There is little dispute over the facts in this case and, therefore, the Court will not dwell on them at great length. The defendant corporation maintains a facility at Marion, Ohio, where it manufactures household appliances. Present in the Marion plant are mechanical conveyors which are used to move parts from point to point within the plant. A guard screen is utilized

in order to protect the employees working beneath the conveyor from the hazard of falling materials. Said guard screen is suspended approximately twenty feet above the plant floor and covers about 295,800 square feet hung under 65,000 linear feet of conveyor. The guard screen was suspended over about 36% of the total plant floor area.

It is among the duties of the maintenance department employees to clean the guard screen. This includes the removal of parts after they may have fallen from the conveyor and the placing of paper used to cach oil and grease drippings.

On June 28, 1974, a maintenance employee, George Cowgill, fell approximately twenty feet from the guard screen into a parts box. Hours after the accident, Mr. Cowgill died. An investigation by the Occupational Safety and Health Administration (hereafter OSHA) followed Mr. Cowgill's death. OSHA cited the defendant, charging a serious violation of the general duty clause of the ACT, 29 U. S. C. § 654. The citation required immediate abatement and proposed a $600.00 penalty. Said citation is being contested by the defendant in a matter now pending before the Occupational Safety and Health Review Commission.

The complainants in this case are also maintenance workers charged with the duty of cleaning the guard screen. On July 10, 1974, the complainants, Mr. Deemer and Mr. Cornwell, reported for work and were told by their foreman, Gale Price, to clean the guard screen except for three areas where he did not feel that screen was adequately supported to walk on. Upon receiving the order, the complainants refused to obey it, stating that they believed that the screen was unsafe. They were then taken to the office of the personnel director where they were issued written reprimands and sent home losing six hours pay.

The defendant attempted to prove at trial that the complainants walked off their jobs not because they felt it was unsafe, but rather because they wanted an increase in pay for performing such work. The Court, however, is not willing to

accept this contention and expressly finds that the employees refused to perform the cleaning operation because of a genuine fear of death or serious bodily harm. This is supported by the fact that the foreman was not willing to allow them to use the Verta-lite procedure for cleaning the screen. Said procedure was an alternative to walking the screen developed after Mr. Cowgill's death. Furthermore, given that death, it is perfectly understandable that surviving employees would be reluctant to subject themselves to the possibility of a similar accident. The Court further finds that the threat of death or serious bodily harm was real and not something which existed only in the minds of the employees. While the defendant had begun to replace the original mesh panels of the screen with panels constructed of heavier gauge metal mesh having spiral wire connections, at the time in question only about one-third of the entire screen had been replaced. Certainly the fact that a man had fallen through the screen and been killed is the strongest possible evidence that it was unsafe and dangerous. Thus the Court finds that the job of cleaning the guard screen did present a danger of death of serious bodily harm.

The Secretary is complaining that the employees involved in this case are being discriminated against by the defendant as a result of exercising rights afforded to them under the ACT. 29 U. S. C. § 660(d)(1) states:

> No person shall discharge or in any manner discriminate against any employee because such employees has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

Pursuant to his authority under the ACT to issue regulations, the Secretary promulgated 29 C. F. R. § 1977.12(b)(2), which states:

> However, occasions might arise when an employee is confronted with a choice between [not] performing assigned

> tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employees, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Under this regulation, it is clear that the employees were justified in walking off the job. The Court has held that there was no reasonable alternative and has further held that the employees' action was a good faith refusal to expose themselves to a dangerous condition. These findings, however, are not, by themselves, dispositive of this matter. The defendant argues that the regulation quoted above is clearly inconsistent with the statute and is thus invalid. This issue is the major question presented to the Court in this case.

Successfully challenging administrative regulations is a very difficult task. Once promulgated, regulations have the force of law and the presumption of validity. *United States* v. *Mersky*, 361 U. S. 431, 437-38.

> When faced with a problem of statutory construction, this Court shows great deference to the interpretations given the statute by officers of the agency charged wilth its administration. "To sustain the commission's application of the statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in a judicial proceeding." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).

> The above-quoted language is especially true when the administrative procedure being challenged involves a contemporaneous construction of a statute by men charged with the responsibility of setting its machinery into motion. *Zuber* v. *Allen*, 396 U. S. 168, 192 (1969). However, if the inconsistency between the regulation and the statute is so clear that the Court has no choice except to hold that the administrator has exceeded his authority and employed means that are not appropriate to the end specified in the Act, the Court must find the regulation invalid. *Gardner* v. *United States*, 239 F. 2d 234 (5th Cir. 1956); *See also, Commissioner of Internal Revenue* v. *South Texas Lumber Company*, 333 U. S. 496 (1948).

This Court is of the opinion that the regulation in question is clearly inconsistent with the statute and therefore invalid. The reason for this holding is that the Congress squarely faced the issue as to whether or not employees should be permitted to leave the job when faced with a dangerous situation and decided that they should not.

When the Occupational Safety and Health Act was first reported out of committee in the House of Representatives, it contained a provision which would allow employees to absent themselves from a dangerous situation without a loss of pay. 116 Cong. Rec. 38,369, 38,377, 38,378 (1970). The sponsor of the bill in committee, Congressman Daniels of Kentucky, stated:

> The provision on employees not losing pay was so generally misunderstood that we have decided to drop it. We have no provision for payment of employees who want to absent themselves from risk of harm; instead, we have this amendment which enables employees subject to a risk of harm to get the Secretary into the situation quickly. Instead of making provisions for employees when their employer is not providing a safe workplace, we have strengthened the enforcement by this amendment provision to try and minimize the amount that employees will be subject to risk of harm. 116 Cong. Rec. 38,377, 78. (1970).

The bill, as originally reported out of committee, also contained a provision which would have permitted on OSHA inspector to close down a plant operation for up to 72 hours if he found that an imminent danger existed. 116 Cong. Rec. 38,369 (1970). This provision of the bill was also amended so that no shut-down could occur without the application and granting of a temporary restraining order by a federal district judge. *Id.* at 38,376. The version of the ACT, as passed and approved by the Senate, however, did contain a provision allowing an inspector to close down an operation for 72 hours. In conference committee, however, the Senate receded. *U. S. Code, Cong. & Admin. News,* 91st Cong. 2d Sess., at 5236 (1970). Thus the imminent danger section of the ACT as finally signed into law reads as follows:

> (a) The United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

It is eminently clear then that in considering the best methods for dealing with imminent danger situations, Congress considered and rejected employees walking off the job with pay. They also rejected allowing an inspector to close down an

operation. It is obvious that Congress considered the shut-down of an operation such a serious matter that nothing short of the judicial process with its full complement of due process protections was acceptable as a means of accomplishing it. Certainly allowing employees to simply walk off the job was not acceptable. *See Dunlop* v. *Daniel Construction Company, Inc.,* No. C 75-26-N (N. D. Ga. filed Dec. 5, 1975).

Since the Court finds the regulation in question to be invalid, it will enter judgment for defendant. This opinion will serve as the Court's findings of fact and conclusions of law. Such findings moot the defendant's motion to dismiss which was filed just prior to trial.

For the reasons stated herein, good cause appearing, it is

ORDERED that the Court finds 29 C. F. R. § 1977.12(b)(2) to be invalid as inconsistent with the Occupational Safety and Health Act of 1970 and therefore finds in favor of the defendant and the clerk shall enter judgment for the defendant and the defendant shall go hence without day and collect its costs, and it is

FURTHER ORDERED that the motion to dismiss filed by the defendant should be, and it hereby is, overruled as moot.

IT IS SO ORDERED.

/s/ WM. J. YOUNG
United States District Judge

Toledo, Ohio.

APPENDIX D.

Pertinent regulations of the Department of Labor implementing the Occupational Safety and Health Act of 1970

(Codified at 29 C. F. R. 1971.1-1971.12)

GENERAL

§ 1977.1 Introductory statement.

(a) The Occupational Safety and Health Act of 1970 (29 U. S. C. 651, et seq.), hereinafter referred to as the Act, is a Federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and healthier workplaces throughout the Nation. By terms of the Act, every person engaged in a business affecting commerce who has employees is required to furnish each of his employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and, further, to comply with occupational safety and health standards promulgated under the Act. See Part 1975 of this chapter concerning coverage of the Act.

(b) The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, and recordkeeping requirements. Enforcement procedures initiated by the Department of Labor, review proceedings before an independent quasi-judicial agency (the Occupational Safety and Health Review Commission), and express judicial review are provided by the Act. In addition, States which desire to assume responsibility for development and enforcement of

standards which are at least as effective as the Federal standards published in this chapter may submit plans for such development and enforcement of the Secretary of Labor.

(c) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity.

(d) This part deals essentially with the rights of employees afforded under section 11(c) of the Act. Section 11(c) of the Act prohibits reprisals, in any form, against employees who exercise rights under the Act.

§ 1977.2 Purpose of this part.

The purpose of this part is to make available in one place interpretations of the various provisions of section 11(c) of the Act which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the courts, or concluding, upon reexamination of an interpretation, that it is incorrect.

§ 1977.3 General requirements of section 11(c) of the Act.

Section 11(c) provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act. Any employee who believes that he has been discriminated against in violation of section 11(c) of the Act may, within 30 days after such violation occurs, lodge a complaint with the Secretary of Labor alleging such violation.

The Secretary shall then cause appropriate investigation to be made. If, as a result of such investigation, the Secretary determines that the provisions of section 11(c) have been violated civil action may be instituted in any appropriate United States district court, to restrain violations of section 11(c)(1) and to obtain other appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. Section 11(c) further provides for notification of complainants by the Secretary of determinations made pursuant to their complaints.

§ 1977.4 Persons prohibited from discriminating.

Section 11(c) specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under the Act. Section 3(4) of the Act defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any group of persons." Consequently, the prohibitions of section 11(c) are not limited to actions taken by employers against their own employees. A person may be chargeable with discriminatory action against an employee of another person. Section 11(c) would extend to such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate against an employee. See, *Meek* v. *United States,* 136 F. 2d 679 (6th Cir., 1943); *Bowe* v. *Judson C. Burns,* 137 F. 2d 37 (3rd Cir., 1943).

§ 1977.5 Persons protected by section 11(c).

(a) All employees are afforded the full protection of section 11(c). For purposes of the Act, an employee is defined as "an employee of an employer who is employed in a business of his employer which affects commerce." The Act does not define the term "employ." However, the broad remedial nature of this

legislation demonstrates a clear congressional intent that the existence of an employment relationship, for purposes of section 11(c), is to be based upon economic realities rather than upon common law doctrines and concepts. See, *U. S.* v. *Silk,* 331 U. S. 704 (1947); *Rutherford Food Corporation* v. *McComb,* 331 U. S. 722 (1947).

(b) For purposes of section 11(c), even an applicant for employment could be considered an employee. See, *NLRB* v. *Lamar Creamery,* 246 F. 2d 8 (5th Cir., 1957). Further, because section 11(c) speaks in terms of any employee, it is also clear that the employee need not be an employee of the discriminator. The principal consideration would be whether the person alleging discrimination was an "employee" at the time of engaging in protected activity.

(c) In view of the definitions of "employer" and "employee" contained in the Act, employees of a State or political subdivision thereof would not ordinarily be within the contemplated coverage of section 11(c).

§ 1977.6 Unprotected activities distinguished.

(a) Actions taken by an employer or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The proscriptions of section 11(c) apply when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in activities protected by the Act does not automatically render him immune from discharge or discipline for legitimate reasons, or from adverse action dictated by non-prohibited considerations. See, *NLRB* v. *Dixie Motor Coach Corp.,* 128 F. 2d 201 (5th Cir., 1942).

(b) At the same time, to establish a violation of section 11(c), the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the

action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity, section 11(c) has been violated. See, *Mitchell* v. *Goodyear Tire & Rubber Co.*, 278 F. 2d 562 (8th Cir., 1960); *Goldberg* v. *Bama Manufacturing*, 302 F. 2d 152 (5th Cir., 1962). Ultimately, the issue as to whether a discharge was because of protected activity will have to be determined on the basis of the facts in the particular case.

SPECIFIC PROTECTIONS

§ 1977.9 Complaints under or related to the Act.

(a) Discharge of, or discrimination against, an employee because the employee has filed "any complaint * * * under or related to this Act * * *" is prohibited by section 11(c). An example of a complaint made "under" the Act would be an employee request for inspection pursuant to section 8(f). However, this would not be the only type of complaint protected by section 11(c). The range of complaints "related to" the Act is commensurate with the broad remedial purposes of this legislation and the sweeping scope of its application, which entails the full extent of the commerce power. (See Cong. Rec., vol. 116 p. P. 42206 Dec. 17, 1970).

(b) Complaints registered with other Federal agencies which have the authority to regulate or investigate occupational safety and health conditions are complaints "related to" this Act. Likewise, complaints made to State or local agencies regarding occupational safety and health conditions would be "related to" the Act. Such complaints, however, must relate to conditions at the workplace, as distinguished from complaints touching only upon general public safety and health.

(c) Further, the salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters

with their employers. (Section 2(1), (2), and (3)). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

§ 1977.10 Proceedings under or related to the Act.

(a) Discharge of, or discrimination against, any employee because the employee has "instituted or caused to be instituted any proceeding under or related to this Act" is also prohibited by section 11(c). Examples of proceedings which could arise specifically under the Act would be inspections of worksites under section 8 of the Act, employee contest of abatement date under section 10(c) of the Act, employee initiation of proceedings for promulgation of an occupational safety and health standard under section 6(b) of the Act and part 1911 of this chapter, employee application for modification of revocation of a variance under section 6(d) of the Act and part 1905 of this chapter, employee judicial challenge to a standard under section 6(f) of the Act and employee appeal of an Occupational Safety and Health Review Commission order under section 11(a) of the Act. In determining whether a "proceeding" is "related to" the Act, the considerations discussed in § 1977.9 would also be applicable.

(b) An employee need not himself directly institute the proceedings. It is sufficient if he sets into motion activities of others which result in proceedings under or related to the Act.

§ 1977.11 Testimony.

Discharge of, or discrimination against, any employee because the employee "has testified or is about to testify" in proceedings under or related to the Act is also prohibited by section 11(c). This protection would of course not be limited to testimony in proceedings instituted or caused to be instituted by the employee,

but would extend to any statements given in the course of judicial, quasi-judicial and administrative proceedings, including inspections, investigations, and administrative rule making or adjudicative functions. If the employee is given or is about to give testimony in any proceeding under or related to the Act, he would be protected against discrimination resulting from such testimony.

§ 1977.12 Exercise of any right afforded by the Act.

(a) In addition to protecting employees who file complaints, institute proceedings, or testify in proceedings under or related to the Act, section 11(c) also protects employees from discrimination occurring because of the exercise "of any right afforded by this Act." Certain rights are explicitly provided in the Act; for example, there is a right to participate as a party in enforcement proceedings (sec. 10). Certain other rights exist by necessary implication. For example, employees may request information from the Occupational Safety and Health Administration; such requests would constitute the exercise of a right afforded by the Act. Likewise, employees interviewed by agents of the Secretary in the course of inspections or investigations could not subsequently be discriminated against because of their cooperation.

(b)(1) On the other hand, review of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section 8(f) of the Act, or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances,

therefore, an employer would not ordinarily be in violation of section 11(c) by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.

(2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

[38 FR 2681, Jan. 29, 1973, as amended at 38 FR 4577, Feb. 16, 1973]